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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

ALAN DALE PHILLIPS, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 22, 1992

QUESTION PRESENTED FOR REVIEW

The Court of Appeals reversibly erred in not sustaining petitioner's point of error no. 3, which read (Pet.App. 23):

> The trial court erred when it gave the Appellant a 2 level upward adjustment for possession of a weapon during a drug case. When the weapons, hand grenades, were found during a search of Appellant's home, they were not connected to the offense in which he was charged.

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit: The United States of America and Petitioner Alan Dale Phillips.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioner's undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Alan Dale Phillips was represented at trial by attorney David Garcia and Desiderio Trevino, Jr. of Edinburg, Texas. Trial counsel also represented Alan Dale Phillips on appeal.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES BELOW	ii
STATEMENT OF RELATED CASES AND PROCEEDINGS	ii
IDENTITY OF DEFENSE COUNSEL BELOW	ii
THIS TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
Cases	iv
Constitutional Provisions	vi
Statutes	vi
Rules	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND CONSTITUIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Appeal Court's Jurisdiction	3
B. Procedural History In District Court	3
C. Statement of Facts	4

Page

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW 7

ARGUMENT ON QUESTION 9

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

United States v. Aguilera-Zapata, 901 F.2d 1209 (CA5 1990) 7

United States v. Khang, 904 F.2d 1219 (CA8 1990) 8-12

United States v. Mourning, 914 F.2d 699 (CA5 1990) 8

United States v. Scroggin, 880 F.2d 1204 (CA11 1989) 10

United States v. Vasquez, 874 F.2d 250 (CA5 1989) 7

United States v. Wilson, 884 F.2d 1355 (CA11 1989) 11

Constitutional Provisions

	Page
United States	
Fifth Amendment	2

Statutes

21 United States Code	
Section 841(a)(1)	3
Section 846	3
28 United States Code	
Section 1254(1)	2
Section 1291	3

Rules

Supreme Court Rule	
10.1(a)	7
Sentencing Commission Guideline	
§ 2D1.1(b)(1)	2,8,11

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

ALAN DALE PHILLIPS, Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

ALAN DALE PHILLIPS petitions for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On September 2, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. United States v. Phillips, No. 91-8558. This opinion is unreported (Pet.App. 3-9).

JURISDICTION

On September 2, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case (Pet. App. 3-9). On Setpember 24, 1992, the Court of Appeals denied a rehearing motion (Pet. App. 26). Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

Sentencing Commission Guideline § 2D1.1(b)(1) provides that:

> If a dangerous weapon (including a firearm) was possessed during

commission of the offense, increase by 2 levels.

Application Note 3 provides:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

STATEMENT OF THE CASE

A. Appeal Court's Jurisdiction

The Court of Appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History in District Court

Petitioner, Alan Dale Phillips, was convicted of conspiracy to possess more than 1,000 kilograms of marijuana in violation of Title 21 U.S.C. Sec. 841(a)(1), and 846.

On October 11, 1991, the district court after considering the P.S.R. and testimony

of witnesses sentenced the Petitioner to 290 months in prison, a fine of $5,000, a five year supervised release term and $50 mandatory assessment (Pet. App. 10). The Court of Appeals affirmed the conviction.

C. Statement of Facts

This case began in central Texas approximately in March of 1989. A marijuana grower in Coryell County, Texas, by the name of Bobby Ray Ricks was arrested and charged with marijuana trafficking. In September of 1989 with information obtained from Ricks the Texas Department of Public Safety arrested Bobby Joe Blythe, Cortland Duffield and Robert Pernell French in a reverse role undercover investigation in Salado, Bell County, Texas. These arrests had nothing to do with Petitioner. All the above named people were given substantially reduced sentences for their cooperation and testimony in the case herein against Petitioner.

The Government called to the stand as their second witness Ricks. Ricks testified that he owned the Flying R Ranch which he used to grow marijuana indoors in a sophisticated greenhouse operation. Among other things Ricks said he supplied marijuana to French, Duffield, Thomas Flowers, and Terrance and Thomas Brennan, the latter three individuals being Petitioner's co-defendants. Ricks admitted he sold to French, Duffield, Flowers and Brennans' conspiracy, hereinafter called the Flowers group, roughly four hundred (400) pounds total. The Flowers group paid two-thirds of the money "up front" and later paid the remainder when the marijuana was sold.

After being arrested Ricks agreed to cooperate and allowed case agent John Bennett, an Investigator with the Texas Department of Public Safety, to pose as a marijuana broker in order to lure French and

Duffield into a purchase of two hundred fifty (250) pounds of marijuana. At Salado, Texas, Blythe, French and Duffield were arrested when they attempted to purchase the 250 pounds of marijuana. The three had in excess of eighty thousand ($80,000) dollars. When Ricks was asked by prosecutor John Phinizy if Ricks knew Petitioner Alan Dale Phillips, Ricks replied: "I do not." In fact, Ricks went on to testify that he had "never seen him (Phillips) before." Later on cross-examination Ricks added that he had never spoken to Petitioner Phillips on the phone.

Blythe testified he did not know whose money it was, but that Duffield said it came from Petitioner. Blythe and Duffield testified at trial against Petitioner. They testified about two alleged transactions between themselves and Petitioner. Their testimony about the negotiations varied substantially, so much so that their

testimony did not corroborate or substantiate each other.

On June 13, 1990, the indictment's last day of the alleged conspiracy of conviction (P.S.R. at p. 28), a search warrant was executed on Petitioner's residence located at 4837 Azalia Garden Road in Norfolk, Virginia. Petitioner was present at the time of execution of the search warrant. Items seized were three bags containing cocaine and two live TNT hand grenades. Petitioner's sentence was enhanced two (2) points for possession of those weapons.

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because the Fifth Circuit of Appeals has rendered a decision consistent with United States v. Vasquez, 874 F.2d 250 (CA5 1989) and United States v. Aguilera-Zapata, 901

F.2d 1209 (CA5 1990), but in conflict on the same matter with the decision in United States v. Khang, 904 F.2d 1219 (CA8 1990).

ARGUMENT ON QUESTION

This issue's resolution turns on whether the Fifth Circuit's review of the application of Sentencing Guidelines § 2D1.1(b)(1) adequately safeguard an accused's right to due process. The Fifth Circuit, as other circuits, holds that the findings of fact of the district court are reviewed under the "clearly erroneous" standard. United States v. Mourning, 914 F.2d 699, 704 (CA5 1990). Following the Eighth Circuit's opinion in United States v. Khang, it is clear that the Fifth Circuit erred in ruling that the trial court's enhancement of Petitioner's sentencing was proper under the Sentencing Guidelines.

Section 2D1.1(b)(1) of the Guidelines provides that if a firearm or other dangerous weapon is possessed during the

commission of a drug related offense, the offense level is increased by two levels. Application Note 3 under the same section states that the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment is to be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.

As pointed out in Khang at 1222:

> The Sentencing Guidelines must be strictly construed. Dowling v. United States, 473 U.S. 207, 216, 105 S.Ct. 3127, 3132, 87 L.Ed.2d 152, 159 (1985); Williams v. United States, 458 U.S. 279, 290, 102 S.Ct 3088, 3094, 73 L.Ed.2d 767 (1982); La Fave & Scott, Substantive Criminal Law § 2.2(d) (1986); Wharton & Anderson, Criminal Law and Procedure § 19 (1966). Chief Justice Marshall early observed:
>
> > The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain

> principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 4 Wheat. 76, 95, 5 L.Ed. 37 (1820).

Guideline Sentencing is an adversarial proceeding. Khang at 1222; United States v. Scroggin, 880 F.2d 1204, 1209 (CA11 1989). As such, the burden of proof falls on the party asserting the sentencing adjustment. In this instance, the Government would bear the burden of proving that the weapon was "possessed during the commission of the offense" or that the weapon was "present" and that it is probable that the weapon was "connected with the offense." This burden does not shift to the accused, for it is established that the accused only bears the burden of proving the applicability of guideline sections which would reduce the offense level. Khang at 1222; see also,

United States v. Wilson, 884 F.2d 1355, 1356 (CA11 1989).

The Eighth Circuit also pointed out that the Sentencing Commission established the Guidelines so that there could be honesty, uniformity, and proportionality in sentencing. Khang at 1223. Because of these issues, the aggravating nature of U.S.S.G. § 2D1.1(b)(1), the strict interpretation of penal statutes, and the intent of Congress in developing the Guidelines and the specific offense characteristics, the Eighth Circuit ruled that the government must establish a relationship between a defendant's possession of the firearm and the offense which he or she has committed. That Court ruled that the mere presence in the defendant's residence of a loaded firearm near an opium stash was not sufficient to justify enhancing the defendant's sentence for importation of opium. Khang at 1223.

There, the government had stated at sentencing that the firearm had no relationship to the offense for which the defendant had pled guilty, and the probation office had not added any new evidence from an independent investigation. Khang at 1223. That Court disagreed that the burden of persuasion for disproving the enhancement fell on the defendant. Khang at 1223, footnote 7.

Although the Government has not conceded that the grenades were not connected with Petitioner's convicted offense, the Government has not sustained its proof burden in this case. There was no evidence showing when the grenades were obtained, or that they were possessed during commission of the conspiracy of conviction. It was not up to the Petitioner to prove otherwise. No conspiratorial act of Petitioner occurred on June 13, 1990. That

day, his home was searched and the grenades but no marihuana was found. Thus the Government presented no evidence to prove it was clearly probable that the grenades were connected with and possessed by Petitioner during the commision of the marijuana conspiracy.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari.

DATED: December 22, 1992.

Respectfully submitted by
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